

June 24, 2011

VIA E-MAIL

Chairman Phil Isenberg  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Re: Comments on the Fourth Staff Draft Delta Plan (Draft Delta Plan)

Dear Chairman Isenberg and Council Members:

The Western Plant Health Association and Pyrethroid Working Group have reviewed the Fourth Staff Draft Delta Plan as issued by the Delta Stewardship Council on June 13, 2011. Based on our review, we must express concern with some of the comments, information and provisions contained therein. In general, we are very concerned with assumed implications to the Delta associated with pesticides and references regarding a surcharge on pesticides. Our more specific comments are provided further below.

**I. Chapter 6, Improve Water Quality to Protect Human Health and the Environment**

The Western Plant Health Association and Pyrethroid Working Group agree with the general premise that water quality in the Delta needs to be protective of the Delta's beneficial uses. To that end, we believe that the State Water Resources Control Board (State Board), the Central Valley Regional Water Quality Control Board and the San Francisco Bay Regional Water Quality Control Board (collectively, Regional Boards) should, following the procedures established by law, consider the adoption of water quality objectives for pesticides that reasonably protect the aquatic-life beneficial use in accordance with the Porter-Cologne Water Quality Control Act (Porter-Cologne). Until the State Board and the Regional Boards adopt such objectives in accordance with Porter-Cologne, which includes consideration of a number of factors including achievability and economics, it is premature for the Delta Stewardship Council to conclude that the levels of pesticides detected in Delta receiving waters are at a level that will cause impairment to the aquatic life beneficial uses. Further, the Draft Delta Plan acknowledges that organophosphate and pyrethroid pesticides are unlikely to be a major cause of the pelagic organism decline (POD). Thus, the Draft Delta Plan should not depict pesticides as a major stressor on Delta health.

With respect to the recommendations proposed in WQ R5, we agree that completion of the Basin Plan Amendment for diazinon and chlorpyrifos and the Basin Plan Amendment for pyrethroids are appropriate actions to be taken with respect to these pesticides. Until the Basin Plan Amendments are completed, the State Board and the Regional Boards need to continue to refrain from using un-adopted water quality criteria to interpret narrative water quality objectives. Accordingly, the Draft Delta Plan's recommendations for pesticides should continue to be limited to completion of the Basin Plan Amendments as proposed and not be expanded beyond those actions.

With respect to recommendation WQ R8, we support the need for additional special studies for pollutants that may be associated with toxicity in Delta waters and sediments. However, we are very concerned that it is the Delta Stewardship Council's intent to issue a broad directive to the State Board and the Regional Boards that would have them arbitrarily require these studies to be conducted by those being regulated and industries in general. Specifically, considering, for example, the considerable number of studies required by the California Department of Pesticide Regulation (CDPR) for the registration and reevaluation of pesticides, it is not appropriate for the Delta Stewardship Council to direct the State Board and the Regional Board to require further studies for pesticides. Before being imposed, study requirements need to be evaluated on a case-by-case basis to determine if the information is necessary, and if it is appropriate to require a particular entity to bear the burden of conducting the study. Further, the State Board and Regional Boards' discretion to require studies is not unfettered. The need for the study must bear a reasonable relationship to the burden of conducting the study, including consideration of the cost of the study. (Wat. Code, § 13267(b)(1).) Accordingly, we recommend that WQ R8 be revised to state as follows: "The State Water Resources Control Board and Regional Water Quality Control Boards should conduct and require, if appropriate, special studies of pollutants including emerging contaminants and causes of toxicity in Delta waters and sediments."

Next, the Driver Performance Measures include a driver performance measure of meeting TMDLs for critical pesticides by 2020. (Page 121, lines 1-2.) As stated, this implies that load allocations and wasteload allocations must be met by 2020, which is inconsistent with many of the Central Valley Regional Board's TMDL listings. For example, most of the pyrethroid TMDL listings in the Central Valley require that the TMDL be established by 2020 – not that the actual load and wasteload allocations need to be met by 2020. Further, it is inappropriate for the Draft Delta Plan to arbitrarily determine when it is possible for entities to meet load and wasteload allocations for critical pesticides. Compliance deadlines need to be determined when TMDLs are actually developed based on the information available. Accordingly, we recommend that this Driver Performance Measure be revised to state as follow: "TMDLs for critical pesticides (for example, diazinon, chlorpyrifos, and pyrethroids) in the waters and sediments of the Delta be established ~~are met~~ by 2020."

## **II. Chapter 9, Finance Plan Framework to Support Coequal Goals**

The Western Plant Health Association and Pyrethroid Working Group are extremely concerned with two of the Guiding Principles as well as the companion funding recommendations associated with these Guiding Principles. Specifically, we are concerned with the "stressors pay" principle and its example of a surcharge on pesticides, and that the stressor fee be based on the volume of contaminants discharged. (Page 168, lines 11-14, 33-35.) The sale of pesticides in California is already subject to a mill assessment to support CDPR's exclusive authority to control the registration and use of pesticides in California. (CA Food and Ag Code, § 12841.) Any concerns that the Delta Stewardship Council has with respect to the use of pesticides and their potential impact on the Delta should be conveyed to the CDPR. The Delta Stewardship Council does not have any authority beyond conveying concerns to CDPR to regulate the registration or use of pesticide products.

Moreover, unlike the mill assessment that funds CDPR's reasonable regulatory costs associated with the registration and use of pesticides, any "surcharge" on the use of pesticides to fund general operations for the Delta Stewardship Council and other Delta entities would be a tax. The Finance Plan Framework states that the Legislature should grant the Delta Stewardship Council authority to assess "reasonable fees for those who stress the Delta ecosystem, and apply such fees to the operational costs of the Council, Delta Conservancy, and the Delta Protection Commission to allow implementation of the Delta Plan." Under the California Constitution, regulatory fees that benefit the public broadly are considered to be taxes. (California Constitution, Article XIII A, § 3.) A surcharge on pesticides found in the Delta would benefit the public broadly by helping to implement the Delta Plan and its objectives to achieve "coequal goals," and does not provide services directly to the fee payer. Therefore, a surcharge on pesticides for these purposes would constitute a tax. Any state statute that imposes a higher tax, must be passed by not less than two-thirds of both houses of the California Legislature. (California Constitution, Article XIII A, § 3(a).) Considering the constitutional restrictions, the California Legislature cannot grant the Delta Stewardship Council "fee" authority to assess a surcharge on the use of pesticides in the Delta. Accordingly, the Recommended Financing Strategy for the Delta Plan must, at the very least, be revised to remove references regarding a surcharge on pesticides.

The Western Plant Health Association and the Pyrethroid Working Group appreciate the opportunity to comment.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Pinel", with a stylized flourish at the end.

Renee Pinel, President/CEO  
Western Plant Health Association

A handwritten signature in dark ink, appearing to read "Fred Pearson", with a long horizontal line extending from the end.

Fred Pearson, Chair  
Coordinating Committee  
Pyrethroid Working Group